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Characteristics of Contemporary Gag Order Requests in Media Law Reporter Volumes 19 Through 33

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CHARACTERISTICS OF CONTEMPORARY GAG ORDER REQUESTS IN *MEDIA LAW REPORTER* VOLUMES 19 THROUGH 33

by

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As chair of the candidate's graduate committee, I have read the thesis of Brad L. Clark in its final form and have found that 1) its format, citations, and bibliographical style are consistent and acceptable and fulfill the university and department style requirements; 2) its illustrative materials including figures, tables, and charts are in place; and 3) the final manuscript is satisfactory to the graduate committee and is ready for submission to the university library.

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ABSTRACT

CHARACTERISTICS OF CONTEMPORARY GAG ORDER REQUESTS IN *MEDIA LAW REPORTER* VOLUMES 19 THROUGH 33

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The conflict between the First Amendment and the Sixth Amendment is not new nor is it easily decipherable. Both amendments appear to have absolute priority, yet they appear to conflict (Erickson, 1977). The First Amendment declares unequivocally, "Congress shall make no law...abridging the freedom of speech, or of the press[,]" while the Sixth Amendment states with equal force, "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed..." (U.S. Constitution, Amendment I, Amendment VI). Free speech and an unrestricted press can lead to a partial jury, but a jury unbiased by the media may mean restricted speech. In the judicial system the debate

about how to balance these two competing constitutional rights has raged for decades, but one critical area—the nature and characteristics of requests for judicial "gag" orders—has been largely ignored.

This thesis analyzed 103 cases from the *Media Law Reporter* volumes 19 through 33 (approximately 1991-2005) where gag orders were requested because of pretrial publicity. Those 103 cases were evaluated for the type of case, the reason for the case, when the gag order was requested, who requested the gag order, why they requested the gag order, who opposed the gag order, why they opposed the gag order, and why the gag order was granted or denied.

It was found that although the issue of gag orders and their use in trials is not settled there is a general pattern to how they tend to be used. This study found that gag orders are most commonly used by judges in serious criminal trials, particularly at the federal level. Further, these cases usually involved juries, and the targets of the gag order were the parties involved in the trial, not the press.

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Introduction

The conflict between the First Amendment and the Sixth Amendment is not new nor is it easily decipherable. Both amendments appear to have absolute priority, yet they appear to conflict (Erickson, 1977). The First Amendment declares unequivocally, "Congress shall make no law...abridging the freedom of speech, or of the press[,]" while the Sixth Amendment states with equal force, "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed..." (U.S. Constitution, Amendment I, Amendment VI). Free speech and an unrestricted press can lead to a partial jury, but a jury unbiased by the media may mean restricted speech. In the judicial system the debate about how to balance these two competing constitutional rights has raged for decades, but one critical area—the nature and characteristics of requests for judicial "gag" orders—has been largely ignored in academic literature.

Although the nature of gag orders is largely unexplored, scholars have debated at length the constitutional priority assigned to them (Carter & Clark, 2006; Chance, 1996; Todd, 1990). Some scholars have tried to argue for something of a neutral ground,

conceding that gag orders on the press are inherently unconstitutional, but that gag orders on trial participants are acceptable. They argue that there is an important difference between restraining the media and restraining trial participants, and that although it is unconstitutional to gag the media it is still legal to gag trial participants (Swartz, 1990; Stabile, 1990). In a similar vein Carter and Clark (2006) indicated that courts are much more likely to protect the speech interests of the press than of the trial participants themselves.

There is support for this idea in the dicta given by the Supreme Court in *Sheppard v. Maxwell* (Stabile, 1990; Gentile, 1992). Stabile (1990) explained the reasoning behind this by noting that with a gag order on trial participants, the media are still free to publish any information they obtain and First Amendment rights are still protected. Further, Stabile (1990) noted that lawyers and court personnel have a "fiduciary responsibility not to make public disclosures that are likely to result in prejudice or an unfair trial" (p. 346). Also the rights of the media are to observe the proceedings of the court and report them, so as to safeguard against unethical behavior, but there is no inherent right to have access to the trial participants themselves. This is because the media does not hold a special right of access to criminal trials above the rights of the general public (Stabile, 1990).

Distinctions have also been made by some of the courts regarding the standard required for a gag order to overcome the presumption against their constitutionality (Carter & Clark, 2006). When a gag order is imposed on trial participants and the participants challenge the order, the "clear and present danger" standard is generally applied, making the gag orders' rejection more likely. If, on the other hand, the media challenge a gag order that has been imposed on trial participants, the lower reasonable

likelihood standard tends to be applied (Stabile, 1990). The reasoning for this is that "a gag order constitutes a prior restraint when challenged by the silenced individual, but not when challenged by a third party" (Todd, 1990, p. 1177).

On the other side of the debate Stabile (1990) noted, "If the press were restricted from publishing the information that it obtains about a criminal proceeding, the public's ability to scrutinize the criminal justice system would be severely hampered" (p. 342). This is certainly true, especially if the restrictions are systematic, but even if the restrictions are limited to only a few cases, transparency would still be necessary to assure ethical and just proceedings. Sokol (1998) noted that "people simply perform better when their performance is being, or may be, observed" (p. 918). This idea is further explained by Chemerinsky (1998) who indicated that media exposure is likely to lead to fairer trials because judges know that the impartiality of their actions is being scrutinized by the country. Further, open trials educate the public about the judicial process, facilitate fact finding, and help insulate the court against claims of injustice (Sokol, 1998).

This study contributes to this scholarly conversation by carefully examining and describing the characteristics of gag order requests and judicial responses, something that researchers generally have avoided. The study compares the respective defining features of granted and rejected gag order requests. The study first provides a background description of three key U.S. Supreme Court precedents on gag orders. In chapter three, the study provides a literature review of issues surrounding gag orders. Chapter four presents the method employed to analyze gag order opinions that serve as a basis for the findings and discussion of this study. Chapter five reports findings based on careful

examination of 103 gag order cases reported in *Media Law Reporter* from approximately 1991 to 2005. Chapter six will present a discussion of the findings. In chapter seven, a discussion of the limitations and suggestions for future studies is provided.

Statement of Purpose

This study seeks to examine the characteristics of gag orders in an attempt to better understand the ways that they are being used in civil and criminal cases. In order to do that this study looks at the types of cases for which gag orders are requested, when they are being requested, who is requesting them, and why they are requesting them. The study also examines who is opposing the gag orders and why, as well as the reasoning of the courts for the granting or denying the gag order. By examining these properties this study hopes to shed light on the types of cases for which gag orders are deemed acceptable, as well as the reasoning behind why they are being used, despite the presumption against their constitutionality.

CHAPTER TWO

Background

Sheppard v. Maxwell

The U.S. Supreme Court has concluded that news media coverage can result in a violation of a criminal defendant's Sixth Amendment right to a speedy and public trial by an impartial jury. For example, in *Sheppard v. Maxwell* (1966), Dr. Sam Sheppard had been accused of murdering his pregnant wife in a brutal manner (Sheppard, 1966). Sheppard cooperated with police, and was pressured into multiple interviews by them with the media present and without counsel (Sheppard, 1966). In fact, during an inquest held at a local school auditorium with hundreds present, his counsel was forcibly ejected, to the cheering of the crowd, for trying to submit evidence (Sheppard, 1966).

Pre-trial coverage of the crime included many incorrect and prejudicial reports concerning the events and Sheppard himself, along with frequent calls for his arrest in the news media (Sheppard, 1966). Media coverage of the trial was pervasive and extremely intrusive, even in the courtroom itself. During the trial the courtroom was packed with reporters whose noise coming and going was so loud that witnesses and counsel could barely be heard, even with a loudspeaker system installed (Sheppard, 1966). All three Cleveland newspapers published the names and addresses of all 75 prospective potential jurors. Because of this all of the prospective jurors received letters and phone calls regarding the case (Sheppard, 1966).

At the conclusion of the trial Sheppard was found guilty, but the Supreme Court reversed the decision because of the excessive media coverage and its prejudicial

influence on the case (Sheppard, 1966). The Supreme Court reversed the decision in *Sheppard* based solely on the publicity that surrounded the case (held to be an infringement of the defendant's Sixth Amendment right) and not on a demonstration of actual prejudice, which is the traditional rule (Constantini, 1980; Douglas, 1994).

Nebraska Press Association v. Stuart

Another watershed case regarding the use of gag orders is *Nebraska Press Association v. Stuart* (1976). Nebraska (1976) deals with Erwin Simants, who was accused of murdering six people in the course of a sexual assault. Although the crime took place in a small Nebraska town, nationwide press coverage occurred almost immediately and the county attorney, with the defense concurring, requested a gag order be imposed on the proceedings, including on members of the press (Nebraska, 1976). The court granted the order with the stipulation that it would be removed once the jury had been empanelled. The order was to restrict:

> (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. (Nebraska, 1976, p. 543-544)

After the trial was concluded and Simants convicted, the Supreme Court felt the need to hear the case, despite the apparent mootness. The Supreme Court reversed the gag order,

indicating that the trial court had not demonstrated that other means of insuring a fair trial would not have been sufficient, nor that the need for the gag order was strong enough to overcome the presumption against its constitutionality (Nebraska, 1976).

Regarding the legal use of gag orders, Schmidt (1977) declared that "the media's First Amendment interest in access to the news may be balanced against and outweighed by legitimate state interests" (p. 532). His reasoning is simply that the media are generally and properly excluded from the meetings of private organizations, from executive sessions of official bodies, Supreme Court conferences, and grand jury proceedings, and therefore it can reasonably be assumed that it is just as proper to exclude the media from attending or publishing information regarding trials, even if it is not necessary to assure a fair trial (Schmidt, 1977).

In contrast to Schmidt's open policy on gag orders, Stabile (1990) asserted that in *Nebraska Press* the court offered a strict three-part test, which had to be satisfied before a court could impose a gag order on the media:

> The test requires a court to consider: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." (p. 342)

Commenting on this three-part test, Garbacz (1992) stated that "[m]any commentators have concluded that satisfying all three-prongs of *Nebraska Press*, and thereby justifying the imposition of a prior restraint, is impossible. Yet the Supreme Court has steadfastly maintained that courts should not deem prior restraints per se unconstitutional" (p. 3).

Gentile v. State Bar of Nevada

In *Gentile v. State Bar of Nevada* (1991), Grady Sanders was accused of stealing money and cocaine that had been stored by the police in a vault owned and operated by Sanders (Gentile, 1991). Two police officers had unrestricted access to the goods, but were dismissed as suspects by the police. Leaks in the police department informed the press that the chief suspect was Sanders and subsequent publicity caused Sanders to go out of business (Gentile, 1991). In an effort to stem the tide of negative publicity regarding his client, the defense attorney, Dominic Gentile, for the first time in his career initiated a press conference (Gentile, 1991). Following the press conference, the State Bar of Nevada then initiated proceedings against Gentile, claiming he intentionally tried to prejudice the potential jury pool, which would violate a state bar code of conduct. The Nevada Supreme Court then disciplined Gentile for his extrajudicial statements, but the U.S. Supreme Court reversed the action, finding that although a court could restrict a lawyer's speech if it had a substantial likelihood of prejudicing the pending legal proceeding, that was not the case here (Gentile, 1991).

Garbacz (1992) stated that "[a]lthough courts did not commonly employ indirect restraints prior to *Nebraska Press*, trial judges responded to *Nebraska Press*' lesson and began to use indirect restraints with increasing frequency" (p. 5). Further the author declared that "[i]f the door to indirect restraints was partially opened by *Sheppard*, *Nebraska Press* marked the official first step through the door. Both the majority and dissent in *Nebraska Press* were willing to exclude restrictions on trial participants from the protection of the prior restraint doctrine" (Garbacz, 1992, p. 5).

In defending the constitutionality of gag orders, Minnefor (1995) stated that "...the Supreme Court's decision in *Gentile v. State Bar of Nevada* should be interpreted to permit trial courts to impose gag orders on trial participants merely upon a finding that extrajudicial comments by those participants are reasonably likely to prejudice the defendant's right to a fair trial" (p. 101-102). If this is indeed the precedent set in Gentile then it would seem that gag orders could be commonly implemented. Further, Goldstein (1993) stated that it is lawful to restrict jurors from speaking to the press and that legal means exist for enforcing their silence.

Garbacz also noted that "First Amendment rights were not absolute and that a court could constitutionally maintain a prior restraint on the press only if the 'gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'" (Garbacz, 1992, p. 3; and Gentile, 1991). Thus, it would appear that even prior restraints can be constitutionally justified against the media, although the standard is set very high.

Gag Order Cases in Media Law Reporter Since 1991

Although it may have seemed after *Nebraska Press* that gag orders would become a thing of the past, that did not turn out to be the case. Researchers noted almost immediately that, even though the *Nebraska Press* decision seemed to signal constitutional disfavor toward gag orders, trial court judges continued to employ gag orders in an attempt to control potentially prejudicial pretrial publicity (Gourley, 1978). It appeared, however, that appellate courts in the immediate aftermath of *Nebraska Press* were very likely to reverse gag orders granted by trial courts. In fact, in one study conducted shortly after *Nebraska Press*, sixteen of seventeen gag orders granted by trial

judges in the years immediately following *Nebraska Press* were reversed on appeal (Gourley, 1978).

In the wake of such odds following *Nebraska Press*, proponents of gag orders seemingly shifted their focus from requesting gag orders directly on the news media to requesting gag orders instead on trial participants. In *Gentile*, the U.S. Supreme Court signaled that gag orders on trial participants, rather than directly on the news media, could pass constitutional muster under a relatively easy standard—proponents need only show that a reasonable likelihood of prejudicial pretrial publicity exists.

Given that gag orders continue to be requested and granted in hopes of thwarting prejudicial pretrial publicity, it is important to understand the nature and characteristics of gag orders. Specifically, it is important to understand if the courts are following the U.S. Supreme Court, by presuming gag orders against the media as unconstitutional, while at the same time allowing gag orders against the trial participants with only a reasonable showing of prejudicial pretrial publicity.

Therefore, the purpose of this study is to examine the characteristics of gag order requests following *Gentile*. The study located and examined one hundred and three gag order case reports in the *Media Law Reporter* from 1991 to 2005. As will be discussed, the one hundred and three cases were examined to determine the characteristics of the cases, including the type of case, the reason for the case, when the gag order was requested, who requested the gag order, why they requested the gag order, who opposed the gag order, why they opposed the gag order, and why the gag order was granted or denied. Basic information about each of the 103 cases studied is summarized in Appendix 2.

CHAPTER THREE

Literature Review

News Media Coverage and Case Outcome

Whether trial publicity affects the outcome of trials is up for debate, but this does not stop lawyers from claiming negative effects against their clients. Minow (1991) found that in the 1980s more than 3,100 claims were made in national newspapers and wire services that a lawyer's client could not receive a fair trial because of trial publicity. In fact, media effects have been an issue surrounding court cases since *United States v. Reid* in 1851, when two jurors, who were accused of being biased by a newspaper article, swore in court that it had not influenced them in regards to the defendant's guilt or innocence (53 U.S. 361).

The importance of understanding whether the publicity surrounding a trial affects its outcome cannot be overstated because if it does then to some degree justice is being held at the mercy of the press. Never has this been more likely to be true than now because an increasing number of cases garner media attention and the press is more intrusive in the courtroom than ever before (Minnefor, 1995).

A vast body of research in the fields of law, communications, and psychology has been devoted to understanding whether media coverage does in fact influence trial outcomes. Most of this research centers around whether jurors are influenced by the publicity surrounding a case and become more prone to convict the defendant. A review of these articles demonstrates that there is disagreement among scholars as to the effects of media coverage. Some seem to feel that the results of publicity are significant and

should be carefully considered during trials. Others indicate that the media might have an impact, but that it is minimal at best. Lastly, some scholars indicate that the media has no influence at all on trial outcomes.

Regarding the effects of trial publicity, Greene and Wade (1988) found that 75% of mock jurors exposed to publicity thought the defendant was guilty, compared to only 60% of those not exposed to the publicity. A study by Ogloff (1994) found that after intense media coverage regarding child abuse and sexual abuse that was said to have occurred in a Christian Orphanage, 95% of the community believed the accused men were guilty. This is despite the fact that the accused were men who had previously been trusted and respected by members of the public. Padawer-Singer and Barton (1975) found that 78% of those exposed to publicity in the form of a newspaper article believed the defendant to be guilty, compared to only 45% of the control group. These scholars are not alone in their findings. Indeed, many other researchers have also found that people are in fact influenced by publicity and become more likely to convict (Devine, 2001; Garry & Riordan, 1977; Hope, 2004; Imrich, 1995, Sak, 1997; Studebaker, 1997; Trial: Influences on the jury, 2003).

A large number of studies have found that there is a positive correlation between the amount of knowledge that people have about a case and the likelihood that they think the defendant is guilty (Constantini & King, 1980; Hope, Memon & McGeorge, 2004; Studebaker & Penrod, 1997; Wright & Ross 1997; Wright, 1997). Further, Wright (1997) found there was a correlation between newspaper reading and knowledge of the case. Similarly, Studebaker and Penrod (1997) discovered that the more media sources a person uses the more they will know and thus the more likely they are to convict. Wright

(1997) also found that people who read the newspaper or watched TV were more likely to perceive a defendant as guilty. Interestingly, even juror exposure to crime news in general has been found to increase the likelihood that a defendant will be convicted (Bruschke, 1999). Testing whether different types of media induce bias to different degrees, Ogloff and Vidmar (1994) found that subjects were more likely to think that the defendants were guilty after reading articles about criminal cases, even more likely after watching a video about criminal cases, and even more likely if exposed to both.

An important area of a potential juror's knowledge is information or evidence that would be considered inadmissible in court. It has been shown that reports of prior convictions, especially of similar crimes, are particularly damaging for defendants (Otto, 1994; Saks, 1997). Otto found that the area of publicity that had the greatest impact on the final outcome of the trial was regarding the defendant's character (Otto 1994). This is particularly noteworthy in light of the fact that evidentiary rules generally preclude introduction of evidence of prior crimes or bad character, except in some limited instances.

Another indirect way that publicity can affect the outcome of a trial is through its impact on witnesses. Witnesses are often a large part of both the defense's and prosecution's case, yet publicity can affect their testimony and its impact. To begin with, the demeanor of a witness is often affected by the stress of testifying in a highly publicized trial. This can be because of concerns regarding personal safety or hounding by the media and others (Breheny, 1995). Further a witness may be too intimidated to testify because of the media attention (Breheny, 1995). Lastly, if a witness has been paid

by the media to tell their story to the press, the jurors may consider their testimony tainted or improperly motivated and discount what they say.

Just as different types of media have been shown to have varying degrees of impact on jurors, so does the way the publicity is presented. A study by Studebaker (1997) found that pre-trial publicity did impact juror's perceptions of guilt, both before and after a trial, but that publicity that was emotional in nature, such as regarding particularly heinous crimes, had the most impact.

However, support for the prejudicial effect of media coverage is not universally found or agreed upon. Some research has not found the media to be influential upon trial outcomes or has found that its effects are complex and varied. For example, in a study of federal murder cases from 1993-1995, Bruschke (1999) found that murder defendants whose cases received high amounts of publicity and those whose cases received no publicity were convicted at about the same rate (82% and 79% respectively). The surprise was that the conviction rate for federal murder trials receiving low amounts of publicity was 92%.

Another example of the complex nature of the publicity riddle is a study by Greene (1988), which found the type of publicity to which the jurors were exposed was highly relevant to how it might influence them. The results indicated that when subjects were exposed to publicity about a man convicted for a crime he did not commit, they were less likely to find the defendant guilty than those who were exposed to no publicity (40% and 60% respectively). He also found that jurors could be swayed for or against the defendant by exposure to positive or negative news stories about similar cases and

that even exposure to news articles about dissimilar cases still had an effect (Greene, 1988).

Further muddying the water, some scholars claim that the studies that do show media effects are not valid in the real world, arguing that they have methodological and external validity problems that are significant enough to make them meaningless (Bruschke, 1999). Perhaps the most vocal of these are Bruschke and Loges (2004), who indicated there is no basis in communication research for purported publicity effects and that if publicity does bias trial outcomes it is highly overstated by current research. They base this claim on a variety of research and reasoning. To begin with, studies divide their subjects up into groups based on whether they were exposed to negative publicity or not, but in the real world potential jurors are exposed to varying degrees because they use different mediums and consume different content. Further, those jurors exposed to the media are forced to come to a conclusion in concert with jurors not exposed to the media.

One of Bruschke's (1999) most convincing points is that one of his studies showed that there is some evidence indicating that pretrial publicity in real cases may actually increase the chance of acquittal. Despite this, a study by Bruschke (1999) found that in trials receiving no pretrial publicity defendants were given shorter sentence lengths than those with any pretrial publicity. In fact, even one story was enough to significantly increase the sentence length.

Regarding the validity of other studies, Bruschke and Loges (2004) noted that many experiments try to make the defendant's guilt ambiguous, having a goal of a fifty-fifty distribution of convictions and acquittals with the control group. This is done in an attempt to avoid ceiling effects, which would be highly likely in an experiment where

guilt or innocence appears very clear. The problem is that this is unrealistic because actual conviction rates are about 80% (Bruschke & Loges, 2004).

Instead, Bruschke and Loges (2004) indicated that the largest effect on trial outcome is economic. Their research shows that the wealthier a person is, the less time he or she will have to serve and the more likely it is that he or she will be acquitted. Another important, albeit obvious, effect on trial outcomes is the actual evidence in the case. Saks (1997) found that when jurors are exposed to plentiful trial evidence, pretrial publicity and biases are greatly diluted.

In a novel argument, Strauss (1996) declared that the best argument against publicity impacting a trial is that society trusts judges to make decisions based solely on courtroom evidence every day, despite being exposed to outside publicity. Further, judges are never sequestered or instructed to refrain from viewing television or reading newspapers. Strauss argued that legal training is in no way designed to make a judge immune to media effects or to outside pressure. Thus she declares that if judges are sufficiently unaffected, so jurors must be also.

Unfortunately, this argument actually proves little, except that the system is inconsistent. It does not, as Strauss claimed, necessarily lead to a conclusion that jurors are not influenced by the media. In fact, using the same logic one could argue that since jurors are treated by the justice system as being influenced by the media, that means judges must also be influenced and the system should take measures to shield judges from being impacted by publicity.

Other scholars argue that the impact of the publicity surrounding a trial is irrelevant or even beneficial because in early U.S. courts knowledge concerning a case

was considered a prerequisite to jury service, instead of a detriment (Minow, 1991). In fact, Minow (1991) argued that the current pursuit of a jury ignorant of the facts of a trial destroys the judicial system because the search for unbiased jurors becomes a search for the uninformed and unintelligent.

In a similar plea that informed jurors not be excluded from the judicial process, Strauss (1996) argued that in early U.S. courts jurors were selected because they knew the defendants and were thus deemed most capable of determining the truth of the accusations against them and evaluating the credibility of their testimony. Strauss (1996) also noted that by placing a premium on ignorance to the facts, the court is placing a premium on jurors who are ignorant in general.

Surprisingly, analysis of past studies demonstrates that students, who are the most common subjects used for research, are less likely to convict than a more representative group (Bornstein, 1999; Steblay, 1999). Thus, the current body of research may actually understate the effects and impact of publicity because it is based upon groups that are inherently less likely to convict. Steblay also found that the experimental studies that found the strongest effects were also the most realistic (Steblay, 1999).

Despite claims by some that existing research is invalid or too inaccurate to demonstrate a prejudicial effect by the media, when the body of research is taken as a whole it does seem to indicate that there is a biasing effect by the media. For example, Bornstein (1999), who analyzed 20 years worth of articles about juries in the journal *Law and Human Behavior*, found that although most studies were not very realistic, their results differed very little from those studies that were considered more realistic. This means that the results of surveys and a wide variety of experiments, which nearly always

found that the media does affect juries, should be considered accurate. Similarly, after analyzing forty-four studies, Steblay, Besirevic, Fulero, and Jimenez-Lorente (1999) declared, "The data support the hypothesis that negative pretrial publicity significantly affects jurors' decisions about the culpability of the defendant" (p. 229). After analyzing the journal *Communication Law and Policy* from 1996-2004, Reinard and Ortiz (2005) came to the same conclusion and indicated that most research demonstrates that publicity influences jurors and their decisions. After conducting a meta-analysis Studebaker (2000) came to the conclusion that laboratory studies may actually underestimate publicity effects.

The convergence of so many different studies, each finding similar results, demonstrates that it is highly likely that publicity does in fact influence trial outcomes. Thus, it is imperative to take a deeper look at how the media impacts trials and what can be done about it. This study tackles only a small piece of that examination by looking at the characteristics of judicial responses to gag order requests. Although this will not uncover anything about the effectiveness of gag orders or the impact of the media on a trial, it does demonstrate how judges are using gag orders in their courtrooms.

Methods of Countering Pretrial Publicity

From the preceding it would appear that publicity has an impact on trial outcomes and is therefore worthy of consideration regarding its impact on the fairness of the trial. Judges generally seem to act as though publicity does have an impact on trial outcomes and use a variety of measures in an attempt to mitigate the effects of publicity. These include jury deliberations, voir dire, jury instructions, delay, sequestration, change of

venue, change of venire, and gag orders, all of which were outlined by the Supreme Court in *Sheppard* (1966) and *Nebraska Press* (1976).

Jury deliberations are a method built into our judicial system. They occur in every jury trial and are considered essential to a fair outcome. Deliberations allow for jurors to discuss evidence and various aspects of the case, so that they can come to a decision together about the guilt or innocence of the defendant. The assumption is that by working as a group the bias or prejudice of any single individual will be overridden by the group.

Stehlin (2005) stated that "Voir dire is the primary and preferred remedy for pretrial publicity" (p. 307). Voir dire consists of questioning the prospective jurors by the judge and counsel in order to root out biased jurors. Sometimes it can be very extensive and privately held in the judge's chambers, but this is rare. Instead it is more frequently brief and the questioning occurs in front of other potential jurors and the public in open court.

Judicial instructions for the jury are nearly always, if not always, used in jury trials. They can vary from simple to complex and are totally under the judge's control. Thus, a judge can tailor his jury instructions to suit the context of a particular trial. Generally, such instructions include an exhortation to ignore information garnered from the media and to instead rely solely on the information presented at the trial. Frequently the judge will also instruct the jurors to avoid watching television news programs and reading the newspaper in order to avoid further sources of potential bias.

Postponing the trial until the media frenzy surrounding it has died down is another potential tool at the judge's disposal. Although used infrequently some claim it is a useful method of providing the defense with a fair trial.

A less common, but well known, method is sequestration. This occurs only in trials where media publicity regarding the case is pervasive. Sequestration occurs after the jury has been selected. The jurors are then taken somewhere to stay for the duration of the trial where their media access can be restricted and even monitored. Similarly, outside contact is limited.

Another infrequent, but well known, method is change of venue. When media attention in a certain area is overwhelming, the case can be tried in another area where the case will be less known. This has been used in cases such as the 1995 Oklahoma City federal building bombing, where the local community was perceived to be highly inflamed against the defendant, and despite high levels of national coverage, other communities were less prejudiced toward the defendant. Thus Timothy McVeigh's prosecution took place in Denver (U.S. v. McVeigh, 1996).

Less well known is the change of venire. This occurs when media coverage is likely to have biased the local jury pool, but it is still deemed necessary or important to try the case in the jurisdiction where it occurred. Thus, a jury is brought in from another community, where the likelihood of their being prejudiced against the defendant is lower.

Lastly, the judge has the authority to issue a gag order. The judicial system considers this the most extreme and least acceptable method of reducing the impact of the media (Chance, 1996). If the judge can demonstrate prejudicial publicity against the defendant, the judge has the capacity to issue a gag order against the press or against the

participants in the trial. In this way the judge can try to stop inadmissible or prejudicial information from being propagated in the press and influencing the jurors. Further, if the information has already been published the judge can try to stop it from being repeated, decreasing the likelihood of its spread and influence. While stopping the local spread of rumors may be impossible, stopping the national spread of information regarding the case could increase the effectiveness of other measures, such as change of venue or change of venire.

Gag Orders

While each of the methods of attempting to remove the influence of publicity on trial outcomes has received some study, there have been relatively few studies regarding the usefulness of gag orders issued by judges in criminal trials. Instead the debate has almost entirely surrounded the issue of whether the First Amendment trumps the Sixth Amendment, or vice versa. The debate regarding the use of gag orders, or the free press/fair trial debate, is a fierce one, both sides vehemently arguing for or against press restrictions to control media's coverage of trials. In a way both sides are constitutionally correct, as the Constitution provides for both a free press and the right to a fair trial, each essential parts to a just and free society. Choosing one value over the other is extremely difficult and sorting out the issue based solely on constitutional arguments is not likely to resolve the question, for although free speech is necessary to insure justice, it also appears to have the power to destroy the justice it protects.

Instead, it might be important to examine whether gag orders are actually an effective measure to help insure a fair trial. Doing so would provide an opportunity to demonstrate either the need for gag orders or their ineffectiveness and thus prove them

unnecessary. Therefore, an answer to the free press versus fair trial debate may be found by looking in an entirely different place: Do gag orders actually influence trial outcomes?

Concerning this issue Garry and Riordan (1977) remarked, "[t]he greatest irony of the fair trial/free press debate is that gag orders are least efficacious in guaranteeing a trial by impartial jurors in the controversial cases in which gag orders generally are thought to be most necessary" (p. 579). Many feel similarly, though few studies actually examine the characteristics of gag orders directly and what studies there are on the topic disagree (Carter, 2006).

Two of the reasons for which scholars feel that gag orders are ineffective are timing and the publicity surrounding the gag order itself. Garry and Riordan (1977) wisely pointed out that "the earliest opportunity to procure such an order may be too late to shield the jury pool from exposure to press coverage of events relevant to the case or to the defendant's character" (p. 577-578). This is certainly true and an important factor to consider in evaluating the effectiveness of gag orders. Nevertheless, there is a chance that it might save potential jurors from exposure.

With regard to the publicity surrounding the issue of the gag order itself, publication of the gag order and the surrounding debate might increase public awareness of the trial, which could bias potential jurors. On the other hand, even with the increased publicity, after the gag order has been issued, the resulting publicity will contain less biasing information and is thus less likely to bias potential jurors.

An important part of understanding gag orders is knowing who is seeking them, why they are seeking them, and when they are seeking them. By uncovering and examining this information, it becomes easier to look at the constitutional issues that

underlay the debate and by extension the acceptability or unacceptability of gag orders. For example judges may issue gag orders more to protect the judicial processes and systems from public scrutiny than to protect the rights of a defendant and it is for this exact reason that prior restraints are to be presumed unconstitutional. Further if gag orders are sought in the pretrial phases of a case they are more likely to be effective in shielding potential jurors from prejudicial information, and thus more likely to aid in providing a fair trial. Only a very limited number of studies have sought to understand the characteristics of gag orders, which underlie these crucial questions.

Regarding why judges impose gag orders, Chance (1996) declared that "no published studies examine how, when, and why judges impose restraining orders on the media or on trial participants" (p. 275). She then conducted a mail survey of Florida judges in an attempt to answer these questions. Of twenty-one federal court cases found by a computer search, 43% of gag orders were issued at the request of the presiding judge, 29% requested by the defense, 19% by both parties, and 10% by the plaintiff or prosecution (Chance, 1996). Chance also reports that 60% of judges indicated that the physical safety of trial participants was the "most influential factor" in considering gag orders, while only 16% indicated that privacy was the biggest factor (Chance, 1996). Seventy-eight percent of the judges indicated that issuing a gag order was used only as a last resort (Chance, 1996).

The responses by the judges who participated in the study indicate that 90% agreed that "news media have a constitutional right to receive information from trials" (Chance, 1996). Further, 61% of the judges felt gag orders on the media were presumptively unconstitutional, while 23% said that they were not presumptively

unconstitutional. In contrast to this, only 35% of judges indicated that restraints on trial participants were presumptively unconstitutional, while 33% indicated that they were not (Chance, 1996).

More than half of the judges felt that out-of-court statements regarding the trial made by trial participants jeopardize a fair trial. Further, more than half of the judges felt that lawyers were the most likely to make the jeopardizing statements (Chance, 1996). Similarly 84% of the judges felt that gag orders on the media were more extreme than gag orders on trial participants, and two-thirds agreed that gag orders on lawyers were more appropriate than on other trial participants (Chance, 1996).

Based on this same idea of distinction between the different groups involved, Chance (1996) noted that it appeared that courts which constantly struck down gag orders saw prior restraints as presumptively unconstitutional, while courts that sometimes upheld gag orders distinguished between gag orders on the media and gag orders on trial participants. The results of the study showed that judges tended to make their decisions regarding gag orders based mainly on their interpretation of the Constitution (Chance, 1996).

From the preceding it becomes apparent that part of understanding who seeks a gag order and why concerns the target of the gag order. This is because some judges consider protecting the First Amendment rights of the press as requiring a higher burden of proof than that necessary for trial participants and in particular lawyers. Thus, it is important to understand whether the target of the gag orders tend to be the press or the trial participants.

A study by Imrich (1995) found that although the press may pass on prejudicial information before a case, they usually get that information from law enforcement. Interestingly, once the trial had commenced, the primary source shifted from law enforcement to the prosecutor (Imrich, 1995). Not surprisingly defense attorneys were found to be the primary source of information regarding a suspect's innocence (Imrich, 1995). Therefore, it would seem that a gag order on trial participants might be effective in stemming the flow of prejudicial information, particularly once the proceedings had begun.

Imrich (1995) also found that nationally reported crime stories were more likely to contain prejudicial information (31.8%) than locally reported crime stories (23.3% same city, and 29.1% same state). Further, news stories about homicide were the most likely stories to contain prejudicial information (32.7%). In an effort to eliminate prejudicial content some states have adopted voluntary press-bar agreements, but this was found to have no impact on content and 67% of the stories violated at least one of the guidelines adopted (Imrich, 1995). Therefore, the type of case and the level of the court are also important to know because certain types of cases are more likely to face prejudicial media.

Another detail noted by Imrich (1995), which initially might seem unimportant, is that first time reports were the most common crime stories and were less likely to contain prejudicial information (23.1%) than follow-up stories (32.8%). In reality this might prove to be important, even essential, to the effectiveness of gag orders because it shows that later stories are more likely to contain prejudicial information. Thus, a gag order

might be able to be issued early enough to restrict some of the prejudicial information from getting out.

Therefore it is imperative to understand not just why courts are still issuing gag orders, despite their being presumed unconstitutional, but also at what stage of the litigation they are issuing them. It is also important to understand which group is more likely to pursue the gag order in the first place because if judges are seeking them more than the defendant, they may be doing so for their own protection and not for the Sixth Amendment rights of the defendant. Further, it is important to understand what type of cases are successful in overriding the First Amendment and receiving gag orders because if they are being granted too broadly it will demonstrate that the U.S. Supreme Court's opinions in *Nebraska Press* and *Gentile* have not been heeded.

The U.S. Supreme Court has labeled gag orders as presumed to be unconstitutional. The reason for this is that prior restraints are likely to have a chilling effect on speech. Those who are under the effects of the gag order may not be sure what they can say and what they cannot, and therefore they are likely to self-censor more information than they should (Todd, 1990). Further, in the early 20th century case of *Near v. Minnesota* the Court declared three potential exceptions to a total ban on prior restraints: "first, statements to be made during wartime that would hinder the war effort, such as publication of troop movements and numbers; second, obscenity; and, third, statements that would incite violence or revolution" (Carter, 2006, p. 37). Given these three possibilities it would appear that speech regarding adjudicative matters should generally not be restrained.

In studying the constitutionality of gag orders, as already noted, some courts also distinguish between those imposed on trial participants and those imposed on the press. While some feel that the former are acceptable, even if the latter are not, many still believe that no gag orders are constitutional in a courtroom setting and Todd noted that some cases have found gag orders on parties to effectively be prior restraints on the press and have struck them down (Todd, 1990).

Along these same lines Chemerinsky (1998) argued that lawyers should not be subject to gag orders because their speech is in regard to the court, which is therefore about the government, and political speech is clearly protected by the First Amendment. Swartz (1990) reminded that "[g]enerally, the government cannot condition privileges and benefits upon the sacrifice of first amendment rights" (p. 1427). Swartz (1990) explained the rationale behind this, noting that lawyers are usually considered officers of the court, while "[d]efendants and witnesses are haled into the court against their wills" (p.1428). It is this difference, lawyers choosing to be officers of the court and trial participants being required to speak in court, which is sometimes used to justify gag orders on lawyers.

Chemerinsky (1998) argued that lawyers should counter any speech against their client unless the speech is clearly not harmful to their client. This means that lawyers should feel obligated to respond to leaks by police and prosecutors or other damaging information and speculation in the media. The reason is that media exposure can lead to quicker and better settlements, in order to avoid embarrassment (Chemerinsky, 1998). Further, public discourse about a case can lead to reforms that will benefit society as a whole (Chemerinsky, 1998).

CHAPTER FOUR

Methodology

Methodology Overview

As noted by both Chance (1996) and Carter (2006), very few studies have examined the characteristics of the cases in which gag orders were sought. Most have instead focused on the effects of pretrial publicity or whether the First or Sixth Amendment had priority. Therefore the current study looks closely at federal and state cases where gag orders were requested.

The reason for doing this is that although the U.S. Supreme Court has labeled gag orders as presumptively unconstitutional, it has not banned them entirely. Thus, in certain circumstances gag orders are considered appropriate. The current study seeks to understand what those circumstances are and how gag orders are being used.

To accomplish this, the current study examined cases from the *Media Law Reporter* volume 19 through volume 33 (approximately 1991-2005) where gag orders were requested because of pretrial publicity. The *Media Law Reporter* is an authoritative source for cases involving the media and was thus used as the sample from which to select the cases. *Media Law Reporter* is published by a private, Washington, D.C.-based company called Bureau of National Affairs, and it includes verbatim transcripts of judicial opinions on communications law issues in federal and state courts. *Media Law Reporter* may be both less inclusive and more inclusive than judicial opinion databases such as LexisNexis or Westlaw. It is more inclusive in that it may include opinions, culled from public court files, that the courts themselves have not chosen to "publish" in

official court reporting volumes. It is less inclusive in that BNA and *Media Law Reporter* rely, in part, on attorneys around the country to voluntary submit, for consideration to be published, judicial opinions in cases with which those attorneys are familiar. *Media Law Reporter* editors then decide what actually gets included in the service's weekly updates, which have heretofore been available only in print form, but (as the study was concluding) have just now been made available online.

The cases used in this study were selected during a previous study on gag orders by using *Media Law Reporter's* classification guide (see Appendix 1) and selecting all of the pertinent cases from the sections on prior restraints and fair trial, free press (Carter, 2006). The sample period includes 15 volumes of the journal and identified a total of 103 federal and state cases (see Table 1). The starting point of 1991 was selected because that was when the U.S. Supreme Court gave its opinion regarding gag orders in the Gentile case. As a landmark case, Gentile presumably altered the way gag orders are viewed by the lower courts. Cases were analyzed up to 2005 because the study began in early 2006 and the cases were selected at that time.

All of the state and federal cases in which a gag order was sought, whether it was granted or not, were entered into a Microsoft Excel database. A range of information regarding the gag order was then recorded, which included the type of case, the reason for the case, when the gag order was requested, who requested the gag order, why the gag order was requested, who opposed the gag order (if anyone), why they opposed the gag order, and whether the gag order was granted or denied. Further, the judges' reasoning for granting or denying the gag orders, if provided, was noted.

Although *Media Law Reporter* is recognized as an authoritative source of gag orders it may represent only a small subset of all the cases for which gag orders were sought. There are likely other gag order cases out there, but this is believed to be a representative group that has been selected by a reputable publisher. Thus, although this study may not be considered exhaustive, it is certainly a study of the opinions thought to be of most importance by the country's most prominent publisher of communications law judicial materials.

Coding for each case was done by reading the case and making note of the pertinent information in the Excel spreadsheet, such as why the gag order was requested, who opposed the gag order and why the gag order was granted or denied.

To analyze the data, Excel pivot tables were used. Whether the court granted or denied the gag order was compared against other variables, such the year of the case, the type of case, when the gag order was sought, and who sought the gag order.

CHAPTER FIVE

Findings

The purpose of this study was to gather data on the characteristics of gag orders in an attempt to better understand the constitutional and other issues behind how and why they are being used by the courts. The current study analyzed 103 cases from *Media Law Reporter* volumes 19 through 33. Those 103 cases were evaluated for the type of case, the reason for the case, when the gag order was requested, who requested the gag order, why they requested the gag order, who opposed the gag order, why they opposed the gag order, and why the gag order was granted or denied.

Of the 103 gag orders that were requested, 33 were allowed and 62 were not. Thus, gag orders were allowed in 32% of the cases. There were 7 cases that narrowed the coverage of the gag order or gag orders requested. In the following tables, “not speech protective” means a judicial decision was given to grant a gag order request or uphold a gag order on appeal. Meanwhile, in those same tables, “speech protective” means a judicial decision was given to deny a gag order request or to reverse, on appeal, a gag order request previously granted by a lower court judge.

Analysis of Data

Table 1

Gag Orders by Target of Gag Order

	Not Speech Protective	Speech Protective	Both	Moot	Total
Media	7	33	3	0	43
Parties	24	25	3	1	53
Both	2	4	1	0	7
Total	33	62	7	1	103

In the cases studied the most common group that was the target of the gag order was the parties involved in the case, such as lawyers, members of the court, witnesses, jurors, and law enforcement officers. Gag order were requested to be placed on the parties involved in 53 of the cases and 45% of those gag orders were granted. The only other target of the gag orders in the cases studied was the media. Gag orders were requested to be placed on the media in 43 of the cases and 16% of those gag orders were granted.

This outcome demonstrates that the courts treat the media differently than other parties, but this should come as no surprise because the U.S. Supreme Court has instructed the courts to do so. In some ways this disparity between the way the media and other parties are treated is reassuring because it is an indication that the counsel by the U.S. Supreme court is being heeded. It shows that gag order requests on the press are

being held to a higher standard than gag order requests on the parties involved in the case.

Table 2

Gag Orders by Year

	Not Speech Protective	Speech Protective	Both	Moot	Total
1991	1	5	0	0	6
1992	1	8	0	0	9
1993	2	3	0	0	5
1994	1	8	1	0	10
1995	4	4	0	0	8
1996	4	3	0	0	7
1997	2	1	1	0	4
1998	2	5	0	0	7
1999	0	2	0	0	2
2000	1	5	2	0	8
2001	3	8	1	1	13
2002	4	4	1	0	9
2003	0	0	0	0	0
2004	8	5	1	0	14
2005	0	1	0	0	1
Total	33	62	7	1	103

No pattern was found for the years studied, regarding an increase or decrease in the number of gag orders requested or the likelihood of their success or failure. Of note is that in only 3 of the 15 years studied were the courts found to restrain speech more often than they protected it. The first year was 1996, by a 4 to 3 margin, the second year was 1997, by a 2 to 1 margin, and the third year was 2004, by an 8 to 5 margin.

Table 3

Gag Orders by Criminal or Civil

	Not Speech Protective	Speech Protective	Both	Moot	Total
Criminal	29	42	5	0	76
Civil	4	19	2	1	26
N/A	0	1	0	0	1
Total	33	62	7	1	103

Of the 103 cased studied, 76 were criminal cases and 26 were civil cases. This study found that in criminal cases the courts allowed gag orders 38% of the time. In civil cases gag orders were allowed 15% of the time.

Table 4

Gag Orders by Reason for the Case

	Not Speech Protective	Speech Protective	Both	Moot	Total
A sitting judge appeared on TV and commented of pending cases in other	1	0	0	0	1

jurisdictions					
Adults giving liquor to minors and contributing to delinquency	0	1	0	0	1
Aggravated assault	0	1	0	0	1
Asbestos litigation		1	0	0	1
Bombing	4	0	0	0	4
Child abuse	1	0	0	0	1
Child molestation	0	0	1	0	1
Class suit against Tobacco Companies to recover damages for diseases	0	1	0	0	1
Defamation	1	1	0	0	2
Desegregation plans for school district held in secret meetings	0	1	0	0	1
Divorce	0	2	0	0	2
Drugs	2	1	1	0	4
Embezzlement	0	1	0	0	1
Ex-Governor charged with all sorts of stuff, including witness tampering	0	0	1	0	1
Financial	0	1	0	0	1
Gambling	0	1	0	0	1
Guardianship, daughter in proceeding to end life support of father	0	1	0	0	1
Homicide	7	20	1	0	28

Invasion of Privacy	0	1	0	0	1
Juvenile Court	0	6	0	0	6
Kidnapping	0	1	0	0	1
Lawyers seeking to have revised code of ethics struck down because it infringes on their first amendment rights	1	0	0	0	1
Litigation between utility companies	0	1	0	0	1
Manslaughter	1	2	0	0	3
N/A	5	7	0	0	12
Photographers photographing jurors after the trial when told not to	1	0	0	0	1
Police abuse	1	0	0	0	1
Proceeding between Experian (credit agency) and an Individual	0	1	0	0	1
Prostitution	0	1	0	0	1
Racketeering	2	1	0	0	3
Rape	2	2	0	0	4
Reporter writing about locked out union laborers	0	1	0	0	1
Sexual assault	1	3	2	0	6
Shooting	0	1	0	0	1
Suit against petroleum manufacturer	0	1	0	0	1

because of leaks, etc					
Suit against tobacco companies	0	0	0	1	1
Terrorist attacks (9/11)	1	0	0	0	1
Theft	2	0	0	0	2
Attempted murder	0	0	1	0	1
Total	33	62	7	1	103

The most common reason for a case in which a gag order was sought was homicide. Of the 103 cases analyzed in the current study, 28 were regarding homicide, although only 25% of those actually imposed a gag order.

Table 5

Gag Orders by When Requested

	Not Speech Protective	Speech Protective	Both	Moot	Total
Pre Trial	14	15	2	0	31
Outset of Trial	4	12	3	1	20
During the Trial	1	7	0	0	8
Post Trial	5	2	0	0	7
N/A	9	26	2	0	37
Total	33	62	7	1	103

Timing of the application for a gag order was also a factor in whether it would be granted or not. If the order was sought in the pre-trial phases of a case it was granted 45% of the time. The likelihood of a gag order being granted at the outset of the trial or during the trial was much less likely, at 20% and 13% respectively. If a gag order was sought after a trial, in anticipation of an appeal or retrial, it was granted 71% of the time.

Table 6

Gag Orders by Who Requested

	Not Speech Protective	Speech Protective	Both	Moot	Total
Defendant	4	29	4	0	37
Defendant and Plaintiff	0	1	0	0	1
Defendant and Prosecutor	1	0	0	0	1
Judge and Defendant	0	1	0	0	1
Judge	26	22	2	1	51
N/A	0	4	0	0	4
Plaintiff	0	2	1	0	3
Prosecutor	1	3	0	0	4
Witnesses	1	0	0	0	1
Total	33	62	7	1	103

By far the two most common proponents of gag orders were the defendant and the judge; together they accounted for 88% percent of all the gag orders requested. In fact, in only 12 of the cases studied was someone other than the defendant or judge named as seeking a gag order.

Although both defendants and judges sought gag orders with similar frequency the outcomes between the two parties were quite different. Gag orders were granted 51% of the time when sought by a judge, but only 11% of the time when sought by a defendant. It might seem strange that if a judge sought a gag order it was not granted 100% of the time, but the cases studied included appeals to higher courts, which could reverse the trial judge's gag order and sometimes did, as the numbers indicate.

Table 7

Gag Orders by Why Requested

	Not Speech Protective	Speech Protective	Both	Moot	Total
Damages associated with being identified as a rape victim	0	1	0	0	1
Defamation and potential for harassment	0	1	0	0	0
Fair trial	18	31	4	0	53
Fair trial and privacy	0	1	0	0	1
Fair trial and protection of jury's privacy	1	0	0	0	1
N/A	1	4	0	1	6
Privacy	0	3	1	0	4
Privacy and protection from further harm	0		1	0	1

as victims					
Privacy and protection of minors	0	1	0	0	1
Privacy of guards and their safety from union attacks	0	1	0	0	1
Privacy of jurors	1	0	0	0	1
Protection from harassment/intimidation	1	0	0	0	1
Protection from irreparable harm	0	1	0	0	1
Protection of minors	2	11	0	0	13
Protection of victim	3	0	0	0	3
Threat to free speech during future deliberations	1	0	0	0	0
To protect the jurors from harassment and thus a mistrial	0	1	0	0	1
Decorum of the court	1	1	0	0	2
Fair trial and protection of minors	1	3	0	0	4
Protection of court and juror privacy, safety	0	1	1	0	2
Fair trial, protection of top secret info, protection of witnesses	1	0	0	0	1
Protecting a witness	0	1	0	0	1
Fair trial and decorum of the court	1	0	0	0	1
Fair trial and juror protection	1	0	0	0	1
Total	33	62	7	1	103

The most common reason given for requesting a gag order was the desire for a fair trial. In fact, it was the only reason for seeking a gag order in 51% of the cases. The next most common single reason given was the protection of minors, which was the only reason given in 13% of the cases.

Table 8

Gag Orders by Who Opposed

	Not Speech Protective	Speech Protective	Both	Moot	Total
Appellant	0	0	1	0	1
Defendant	3	3	0	0	6
Defendant and News Media	1	0	0	0	1
Former Defense Attorney	0	1	0	0	1
N/A	6	13	0	0	19
NAACP	0	1	0	0	1
News Media	12	15	3	1	31
News Media and Plaintiff	1	0	0	0	1
Newspaper	5	22	2	0	29
Plaintiff	3	1	0	0	4
TV Station	1	6	1	0	8
Writer	1	0	0	0	1
Total	33	62	7	1	103

The most common group opposing gag orders was the news media, which in one form or another opposed the gag orders in 68% of the cases. Specific groups within the media were often named and by far the most common was newspapers, which were specifically named as opposing the gag order in 28% of all the cases studied. It is also interesting to note that in seven of the one hundred and three cases, the defendants opposed the gag order.

Table 9

Gag Orders by Why Opposed

	Not Speech Protective	Speech Protective	Both	Moot	Total
First Amendment	13	35	6	1	55
First Amendment (Implied)	2	9	1	0	12
First Amendment (Newsgathering)	7	2	0	0	9
First Amendment (Watchdog)	1	1	0	0	2
Increase Publicity To Find Witnesses	1	0	0	0	1
Irreparable Injury	1	2	0	0	3
N/A	7	11	0	0	18
Overbroad	1	2	0	0	3
Total	33	62	7	1	103

In 65% percent of the cases free speech was the reason for opposing a gag order. The next most common reason given was the right to gather news, which was the stated reason in 9% of the cases.

Table 10

Gag Orders by Why Granted or Denied

	Not Speech Protective	Speech Protective	Neither
Did not prove prejudicial media, need, or other means insufficient	0	42	0
Does not incite to unlawful action and is thus legal	0	1	0
Easiest and most effective remedy	1	0	0
Free exchange of ideas not threatened	1	0	0
Future prosecution dependent on victim protection	1	0	0
Information was legally obtained	0	21	0
Irreparable injury	0	1	0
Moot	0	0	1
None given	0	0	2
No authority on jury speech after trial	0	1	0
Openness	0	5	0
Overbroad	0	11	0
Prior restraints are presumed	0	10	0

Unconstitutional			
Prior restraint needed for a fair trial	17	0	0
Protect the decorum of the court	3	0	0
Protection of the jury	2	0	0
Protection of a juvenile	3	0	0
Protection of rape victim	2	0	0
Rebuked parties for arguing cases	0	1	0
in the press, instead of gagging them			
Restricting parties, not free speech	11	0	0
Right to gather news	0	2	0
Shining light on corruption	0	2	0
Sides arguing case in the press	2	0	0
Sixth Amendment rights overrule	4	0	0
First Amendment rights			
Temporary restriction	5	0	0
Time and place restriction – content	2	0	0
neutral and therefore not a prior restraint			

In 43 of the cases the main reason given by the court for not granting a gag order was a failure to demonstrate the need for it. The next common reason was that the information had been legally obtained (21 cases).

In 17 of the cases the main reason given by the court for granting the gag order was the necessity of the prior restraint for a fair trial. The next most common reason were that the court was restricting parties and not the press (11 cases).

Table 11

Gag Orders by Type of Court

	Not Speech Protective	Speech Protective	Both	Moot	Total
State	17	49	5	0	71
Federal	16	13	2	1	32
Total	33	62	7	1	103

Of the 103 cases studied 71 were at the state level and 32 were at the federal level. Gag orders were granted in 23% of the state cases and 50% of the federal cases.

Table 12

Gag Orders by Trial or Appellate Court

	Not Speech Protective	Speech Protective	Both	Moot	Total
Trial	18	29	3	0	50
Appellate	15	33	4	1	53
Total	33	62	7	1	103

Of the cases examined, 50 were regarding trial courts and 53 were regarding appellate courts. Trial courts granted gag orders 36% of the time and appellate courts approved gag orders 28%.

Table 13

Gag Orders by Jury or Other

	Not Speech Protective	Speech Protective	Both	Moot	Total
Advisory Committee	1	0	0	0	1
Judge	0	5	0	0	5
Jury	17	18	5	1	41
Grand Jury	1	0	0	0	1
N/A	14	39	2	0	55
Total	33	62	7	1	103

Only 48% of the cases specified whether they were jury trials or not and of those 41 were jury trials. This study found that in the cases specified as jury trials gag orders were granted 41% percent of the time. In contrast, of the 5 trials specified as being only before a judge none of the gag order requests was granted.

Table 14

Gag Orders by Outcome of Trial

	Not Speech Protective	Speech Protective	Both	Moot	Total
Convicted	4	3		0	7
Convicted in Part	1	0	0	0	1
Acquitted in Part Previously Convicted Waiting for Appeal	0	1	0	0	1
Plead Guilty	0	1	0	0	1
N/A	28	57	7	1	93
Total	33	62	7	1	103

Only 10 of the 103 cases studied contained information regarding the actual outcome of the trial and of those 10 cases, 7 resulted in convictions. Gag orders were granted in 57% percent of the cases resulting in convictions. I have included this information, though the very small number of cases means that it is unlikely to be useful in drawing any conclusions.

Of the 103 cases analyzed, they were five instances of two cases involving the same defendant. There were two cases concerning John Gotti (19 MLR 1996; 33 MLR 1083). The first occurred in 1992 and the description of the imposed gag order contains no information regarding the reason for the case. The second occurred in 2004 and was for racketeering charges. In the 2004 case Gotti requested a gag order on a talk show

host, whereas the 1992 order was from a judge and forbade lawyers and other involved in the prosecution of Gotti from talking to the press about certain matters. They were two separate motions and therefore were treated separately in the study.

The case of *U.S. v. Rahman* (22 MLR 1063; 22 MLR 1407) was recorded twice in the study, once in 1993 and once in 1994. Both entries have to do with the same case, but are regarding different gag order requests. The reason for the case was the 1993 World Trade Center bombing. Both opinions involved denials of requests from journalists to vacate a gag order barring disclosure of discovery materials, but the requests were treated separately in this study because they were made by separate news organizations at different times in the litigation.

The case concerning *In Re Minor Charged* (24 MLR 1057; 24 MLR 1064) was also included twice in the study, both times in 1995. The two motions are regarding the case of a 13 year old boy accused of homicide. In the first motion the judge rules that the identity of the boy cannot be disseminated by anyone, including the press. The second motion occurred one month later, when an appeals court vacated the trial judge's order.

The case *U.S. v. Davis* (24 MLR 1054; 24 MLR 1083) was recorded twice the study, both times in 1995. The case concerned New Orleans police officers accused of various drugs and weapons charges. In 1994 a gag order had been imposed on the parties involved in the case. Both motions recorded in the study were actions by the media trying to have the gag order vacated, which were denied both times.

Lastly, the case of *State v. Marsh* (30 MLR 1505; 30 MLR 1507) was also recorded twice in the study, both times in 2002. The case was concerned with the operator of a crematorium, who was found to have more than 100 uncremated bodies on

the premise. Due to public outrage the court imposed a gag order on the parties involved in the case and then a few weeks later modified the order.

Both the Gotti cases and the *In Re Minor Charged* case are in reality different judges and courts, and thus for the intents and purposes of this study are different cases. The one case in this study where a gag order was altered at the appellate court was *In Re Minor Charged*. Even though it might be considered that the trial court order had no force and became moot after the appellate court decision, the trial court order was nonetheless included in the findings because it did illustrate an action by a trial court judge regarding a gag order that would have been enforced had it not been appealed. It was felt that there was value in leaving the opinion in the study to demonstrate how courts, even if later reversed, deal with gag order questions. The other three cases might be considered duplicates because they are regarding the same case and were handled by the same judge. Despite this, it was important to include them in the study because they show the courts at work. In the *U.S. v. Rahman* and *U.S. v. Davis*, the court denied both attempts to have the imposed gag orders removed, but in *State v. Marsh*, the court was influenced by the petitions of the media and modified the order to make it more narrowly tailored and less restrictive.

CHAPTER SIX

Discussion

Introduction

This study sought to examine the characteristics of gag orders to better understand how and why they are used. One of the few studies to have ever attempted anything like this in the past was conducted by Chance (1996), which found that 43% of gag orders were issued at the request of the judge. The results of the current study were similar, finding that judges requested the gag orders 50% of the time. In the survey conducted by Chance (1996) it was found that only 35% of judges felt that gag orders on the trial participants were acceptable, but the current study found that in actual cases, judges allowed gag orders on trial participants 45% of the time (or 51% of the time if cases where the judge allowed portions but not all of the requested gag order are also counted). Because Chance (1996) was collecting self-report data by means of surveys, it is likely that judges' responses may have been influenced by social desirability.

Characteristics of Gag Orders

Probably the most important finding in the study was that gag orders were much more likely to be imposed on the parties involved in the case than on the press. For example in *U.S. v. Davis* (24 MLR 1083), police officers were charged with drug and other offenses. In order to assure a fair trial the judge initiated a gag order on the parties involved in the case during the pretrial phases of the case. The media sought twice to have this restriction removed, claiming that it infringed upon their First Amendment rights and their right to gather news. Both times the court denied the media, indicating that the media were not being restricting in any way and that the gag order was necessary

to insure a fair trial because of the local community's emotional reaction to the case. In contrast to this, in a case involving the actions of a school board, the court did find that it was unconstitutional to restrict the press' ability to gather news by placing a gag order on the parties involved in the case (*Davis v. East Baton Rouge Parish School Board*, 24 MLR 1513). These differences of opinion could be caused by the nature of the cases themselves or simply because different judges interpret the law differently.

A few judges indicated it was completely reasonable to directly gag the press, though most did not. Thus, gag orders were rarely granted directly on the press. To get around this many judges said that it was acceptable to indirectly gag the press by gagging the parties involved in the case. About half of the judges desiring gag orders on the parties involved in the case granted them. While their legal reasoning could be debated, the fact that the gag orders were issued still poses problems that the First Amendment seeks to eliminate because there could be information being hidden from the public that should be exposed. On the other hand sometimes the restriction may be needed in order to assure a fair trial. After a lawyer intentionally lied to the press in an attempt to prejudice the jury pool in his favor one judge said, "The advocate is still entitled – indeed encouraged – to strike hard blows, but not unfair blows. Trial practice, whether criminal or civil is not a contact sport. And its tactics do not include eye-gouging and shin-kicking" (U.S. v. Cutler 23 MLR 2089, p. 2100).

What this demonstrates is that the courts are adhering to the precedent set by *Nebraska Press* (1976) and *Gentile* (1991). In *Nebraska Press* (1976), the court made it clear that prior restraints imposed upon the press are presumed to be unconstitutional, though they may be constitutionally permitted if the likelihood of prejudicial publicity is

very high and imminent. Meanwhile, in *Gentile* (1991) the court indicated that to impose a prior restraint on the parties involved in the case there only needs to be a substantial or reasonable likelihood of prejudicial pretrial publicity. The courts appear to be following this counsel because only 16% of gag orders sought for the media were actually granted. In contrast, 45% of the gag orders sought for the parties involved in the case were granted. Considering that courts needed to only demonstrate a reasonable likelihood of prejudicial pretrial publicity to impose a gag order on the parties, it is actually surprising that gag order were not granted more frequently, which likely shows the courts' inherent dislike of gag orders.

It was also found that gag orders were more likely to be granted in criminal than in civil trials. This might be because judges think that the fairness of the trial is of greater importance in criminal cases. It could also be a difference in the reasons behind why the gag order was sought in the first place because privacy generally is not a strong enough reason to overcome the presumption against prior restraint.

The results of this study showed that gag orders were more likely to be granted in the pre-trial stages of a case than during the trial. This could be because judges recognize that a gag order is more likely to be effective if put into effect sooner. An excellent example of this is found in *U.S. v. Koubriti* (32 MLR 1625). In this case the defendant was charged in connection with the September 11th attacks on the World Trade Center. While awaiting retrial the defendant sought to have the gag order, which had been issued prior to his original trial, removed because he felt he could get a fairer trial that way. The judge refused because he felt that the information that would be published would prejudice potential jurors. The judge went on to say, “Unfortunately, other remedies that

exist may be tantamount to closing the barn door after the horses are out" (U.S. v Koubriti 32 MLR 1625, p. 1632).

The two most common proponents of gag orders were judges and defendants, which is not surprising. What is interesting though, is that judges sought gag orders even more frequently than defendants and in some cases even sought them against the will of the defendant, such as in the example discussed above of *U.S. v. Koubriti* (32 MLR 1625). One possible explanation for this is that judges are more aware of how to make a trial fair than the other parties involved. It is also possible that judges are afraid of being accused of negligence in controlling the media surrounding the case, which could lead to a mistrial or retrial. Thus, in order to avoid a retrial or mistrial they do everything in their power to demonstrate their efforts to provide a fair trial.

A desire for a fair trial was found to be the most common reason for seeking a gag order. This seems to make logical sense, given that prior restraints are generally presumed unconstitutional and gag order proponents must demonstrate a critical need to overcome that presumption. Some judges have specifically noted that although the First Amendment was important, it had to yield to the Sixth Amendment and that free press could be infringed upon, as long as it was done sparingly.

The next most common reason for seeking a gag order was found to be protection of a minor. This reason is interesting because the gag order associated with the case was often explicitly sought for privacy reasons and not for a fair trial. For an adult, privacy is not likely to overcome the presumption against prior restraints, but for juveniles the rules are different. The courts tended to express a desire for the child's current and future well-being, noting that childhood indiscretions or abuse should be kept from the public

eye in order to allow for a better future for the child. This carries with it some assumptions, such as that children will change their behavior, whereas adults will not. Further, there is an assumption that having their history exposed will permanently harm children, whereas for adults it will not. Whether these assumptions are correct or not is beyond the current study, but certainly open to debate, both on legal and psychological grounds. Despite this, in *Jeffries v. Mississippi*, an appeals court reversed a contempt of court conviction against a reporter who had published a juvenile's record. The judge who reversed the conviction indicated that punishing the free speech rights of the press would damage a "near sacred right" (Jeffries v. Mississippi, 27 MLR 1413, p. 1415; internal citation omitted).

Similar arguments occurred with regard to juries, witnesses, and victims. It was sometimes argued that their privacy was essential to having the judicial system run properly. It was important for all three groups to know that they could be protected from harassment, so that future jurors, witnesses, and victims would be willing to participate in the judicial system.

The most common group challenging gag orders was the news media. Therefore it makes sense that the most common reason given when challenging a gag order was freedom of speech. Usually the First Amendment was appealed to in a generic sense, but on a few occasions a specific concept associated with the First Amendment was used. In this study those specifically mentioned were the right to gather news and the importance of shining a light on corruption and falsehood. In *The Fort Wayne Journal-Gazette v. Baker* (20 MLR 1434) a woman was in proceedings to end the life support of her father. The woman sought a gag order to restrain a reporter who had been present in the court

from publishing any details about the proceedings. The trial court agreed, but the appellate court overruled the decision and quoted Justice Louis Brandeis, who said that "Sunlight is said to be the best of disinfectants; electric light the best policeman" (Brandeis, 1993, as cited in The Fort Wayne Journal-Gazette v. Baker, 20 MLR 1434, p. 1440). Although the woman's intention may have been good, it still could have been important for the community to know of the actions she was planning on taking in the interest of transparency in the public judicial process.

Overall only about one third of the gag orders sought were granted, but when the case was a jury trial this number jumped up to about half. It could be that judges know that jury trials receive greater scrutiny and thus judges feel a greater need to proactively protect the rights of the defendant. The other side of that coin though, is that by doing so judges are also protecting themselves from unwanted scrutiny, though likely not intentionally. Another question to be asked is that if some of the cases that were not specifically said to be a jury trial had no juries, why were gag orders issued? There would be no one to protect from potentially biasing media, other than the judge himself, who in many cases would be exposed to the potentially prejudicing information anyway, during the discovery portion of the trial. So why issue the gag order?

The difference in how courts treat gag orders can also be seen in the state and federal outcomes. At the federal level about half the gag orders sought were granted, but only about a quarter were granted at the state level. Although this could be attributed to the types of cases that make it to the federal level and the publicity involved, it could also show a divergence of opinion between types of courts as to the proper use of gag orders.

Characteristics of Successful Gag Order Requests

The data resulting from this study provided an excellent profile for what courts generally see as a situation in which a gag order is considered acceptable. It would appear that courts are most likely to allow a gag order in criminal cases involving a very serious or heinous crime, which are being argued at the federal level in front of a jury. Further the gag order is typically requested by the judge in order to provide a fair trial and sought in the pretrial stages of the case. Lastly, the gag order is narrowly tailored, directed at the parties involved in the case, and of limited duration.

Characteristics of Unsuccessful Gag Order Requests

In contrast to this, the data also provided an excellent profile for what courts generally see as situations in which a gag order is not considered acceptable. It would appear that courts are most likely to deny a gag order in civil cases or lesser crimes, which are being argued at the state level in front of a judge. Further the gag order is typically requested by the defendant for privacy reasons and sought during the trial. Lastly, the gag order is broadly tailored, directed at the media, and of unlimited duration.

CHAPTER SEVEN

Conclusion

The purpose of this study was to analyze the characteristics of gag orders in an attempt to better understand how and why gag orders are being used. To accomplish that this study examined 103 cases from *Media Law Reporter* and recorded the characteristics of the cases, including the type of case, the reason for the case, when the gag order was requested, who requested the gag order, why they requested the gag order, who opposed the gag order, why they opposed the gag order, and why the gag order was granted or denied.

The findings reveal that although the issue of gag orders and their use in trials is not settled, there is a general pattern to how they tend to be used. This study found that gag orders are most commonly used by judges in serious criminal trials, particularly at the federal level. Further, the cases usually involved juries and the target of the gag order was the parties involved in the trial, not the press.

Although this may seem to be common sense, it is important because it means that gag orders are generally being used appropriately. The U.S. Supreme Court has indicated that prior restraints are to be presumed unconstitutional, but can be used if an important need is shown. Specifically, the U.S. Supreme Court has labeled prior restraints against the media as particularly unacceptable, while indicating that prior restraints on the parties involved in a case are more acceptable. It appears from the results of this study that judges tend to heed that counsel, allowing gag orders against the

press only 16% percent of the time, but allowing them 45% of the time when they were directed at the parties involved in the case.

Study Limitations

There were a few study limitations in relation to the data used. To begin with *Media Law Reporter* might exclude some of the relevant cases. Further the cases included in *Media Law Reporter* might differ in some way from the cases that were excluded, which means that the data may be slightly skewed.

Suggestions for Future Research

This study found that the most common reason for seeking a gag order was for a fair trial, but does a gag order actually help a defendant get a fair trial? This is something this study cannot answer. Future research could seek to answer this question by comparing trial outcomes in cases when a gag order had been sought and obtained to cases when a gag order had been sought and not obtained. A comparison of conviction rates and sentence lengths could indicate a possible correlation between the use of gag orders and trial outcomes, or show no impact.

Replicating this study with different cases or studying older cases, including pre-*Sheppard*, might also shine some light on the reasoning for granting gag orders and whether this has changed over time.

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APPENDIX A

Media Law Reporter Classification Guide

I. REGULATION OF MEDIA CONTENT

05. Prior restraints

- .01 In General
- .02 Authority to restrain
- .05 National security restraints
- .10 Fair trial restraints
- .15 Obscenity restraints
- .20 Privacy restraints
- .30 Judicial review
- .301 – In general
- .302 – Standing
- .303 – Mootness
- .304 – Contempt

08. Fair trial, free press

- .01 Restrictive orders in general
- .02 Judicial authority
- .05 Restrictions solely on broadcast media
- .10 Pre-trial restrictions
- .11 Trial restrictions
- .12 Post-trial restrictions
- .20 Alternative protective measures

.25 Judicial review

.251 – In general

.252 – Standing

.30 Prejudicial publicity as defense

APPENDIX B

List of Gag Order Cases in Media Law Reporter Volumes 19 to 33

Case	Citation	Year	Court holding/decision
Florida v. Davis	19 MLR 1121	1991	Trial court refused to 'gag' lawyers and law enforcement, but did admonish them to follow their professional codes, which they had broken.
News-Journal Corp. v. Foxman	19 MLR 1193	1991	U.S. court of appeals upheld the decision of the District Court to abstain in a deciding on a 'gag' order.
San Bernardino County v. Superior Court	19 MLR 1545	1991	Appellate court reversed the trial court's 'gag' order, but also told them to close the courtroom.
McClatchy News. Inc. v. Fresno County Superior Court	19 MLR 1555	1991	Appellate court vacated order prohibiting publication of juvenile’s identity, even if lawfully obtained.
Wittek v. Cirigliano	19 MLR 1607	1991	Appellate court found that the media should be allowed to report the information it gathered in open court proceedings.
Vermont v. Schaefer	19 MLR 1905	1991	Appellate court reversed 'gag' order and unsealed documents despite a trial being dismissed (mootness).

McClatchy New. Inc. v. Stanislaus County S. Court	19 MLR 1871	1992	Appellate court stayed a lower court's order to not publish a juvenile's name.
U.S. v. Gotti	19 MLR 1996	1992	Trial court imposed a gag order in the high profile Gotti case.
Florida v. Smolka	20 MLR 1058	1992	Judge refused to issue a 'gag' order because everyone involved was acting responsibly and therefore there was no need.
Florida v. Rolling	20 MLR 1127	1992	Court refused to impose a 'gag' order, but did agree to 90 days temporary closure on evidence.
Forth Worth Star-Telegram v. Walker	20 MLR 1379	1992	Appellate court reversed restraint on publishing a rape victim's identity in the paper.
The Fort Wayne Journal-Gazette v. Baker	20 MLR 1434	1992	Court acted improperly in restricting a reporter present at hearing concerning the withdrawal of life support from reporting it.
Keene Corp. v. Abate	20 MLR 1609	1992	Plaintiff sought to be able to publish ads in paper about his side of the issue under trial and appellate court agreed.
Breiner v. Takao	20 MLR 1762	1992	Appellate court found a lower court's 'gag' order unfounded.
Corbitt v. NBC	20 MLR 2037	1992	Plaintiff tried to restrain NBC from

			broadcasting a show about his case, but was denied.
U.S. v. Salameh	21 MLR 1376	1993	Order barring counsel from speaking to press is vacated.
In re H.N.	21 MLR 2318	1993	An order restricting a newspaper from publishing the identity of a juvenile was reversed.
U.S. v. Rahman	22 MLR 1063	1993	Court refuses to allow a writer access to discovery materials.
Austin Daily Herald v. Mork	22 MLR 1442	1993	Court upheld order that allowed media into juvenile hearing, but on the condition that they not publish information about the juveniles present.
Florida v. Lopez	22 MLR 1574	1993	Court will allow media to broadcast an interview containing a defendant's confession to the crime.
Lesher Com. Inc. v. Alameda County S. Court	22 MLR 1383	1994	Court allowed a newspaper to print the name of a juvenile.
U.S. v. Rahman	22 MLR 1407	1994	Court again refuses to allow media access to discovery materials despite a leak.
Times Pub. Co. v. Florida	22 MLR 1410	1994	Court allowed publication of information and pictures of jurors.

Menendez v. Fox	22 MLR 1702	1994	Court allows Fox to broadcast a docudrama about a murder case.
Ohio v. Barker	22 MLR 1908	1994	Court refused to impose a 'gag' order.
Florida v. Richardson	23 MLR 1061	1994	Defendant sought to have attorney's office 'gagged' and press restrained.
Jacksonville TV Inc. v. Florida	23 MLR 1254	1994	Appellate court quashed order to obscure face of an interviewee.
KGTV Channel 10 v. San Diego County S. Court	23 MLR 1303	1994	Appellate court ruled that the media can publish the identity of a minor because it was obtained lawfully.
Kansas v. Alston	23 MLR 1321	1994	Court reverses contempt conviction of a newspaper.
West Virginia ex rel. The Register-Herald v. Canterbury	23 MLR 1569	1994	Appellate court allowed the publication of information about a minor because it was lawfully obtained.
Ohio ex rel New World Com. v. Character	23 MLR 1478	1995	Appellate court removes a gag on the media because of lack of reason for it.
U.S. v. Cutler	23 MLR 2089	1995	John Gotti's lawyer contended his criminal contempt conviction for speaking to press violated First Amendment, but conviction was affirmed on basis of Gentile.

U.S. v. Davis	24 MLR 1054	1995	Media sought to have a partial gag order removed from parties and lawyers, but were denied.
In Re Minor Charged	24 MLR 1057	1995	Trial judge ordered no one, especially the media, to identify or publish the identity or photograph of a juvenile on trial.
In Re Minor Charged	24 MLR 1064	1995	Appellate court vacated order prohibiting publication of juvenile's identity or photograph.
U.S. v. Davis	24 MLR 1083	1995	Media again sought to have a partial gag order removed from parties and lawyers, but were denied.
Rockdale Citizen Pub. Co. v. Georgia	24 MLR 1120	1995	Appellate court remanded a decision to impose a gag order on trial participants and to exclude the media from the trial.
Florida v. Ciambrone	24 MLR 1891	1995	Judge will not 'gag' the trial participants or seal documents.
Davis v. E.Baton Rouge Parish School Board	24 MLR 1513	1996	Appellate court vacated an order that 'gagged' school board members from discussing desegregation plan.
U.S. v. McVeigh	24 MLR 1908	1996	During the trial of Timothy McVeigh the judge ordered all counsel (and support personnel) gagged.

Tennessee v. Montgomery	24 MLR 2172	1996	Appellate court reversed a decision by a trial judge to ban the publishing a prosecution witness' name.
Rufo v. Simpson	24 MLR 2213	1996	Media and plaintiff seek to have gag order removed, instead it is modified (more specific).
News Herald v. Ruyle	24 MLR 2436	1996	Federal district court stayed a state court order gagging media.
California v. Rollins	24 MLR 2569	1996	Judge restricted media access and gag ordered witnesses, lawyers, and court personnel until jury selection and evidentiary hearing is completed.
In Re Inquiry of Broadbelt	25 MLR 1074	1996	A judge who was appearing frequently on Court TV and Geraldo to comment on pending cases was reprimanded for doing so.
Montana ex rel. The Missoulian v. Montana Twenty-first Judicial District Court	25 MLR 1577	1997	A judge ordered documents sealed and all participants to not talk with the media in a criminal trial. The appellate court reversed the sealed documents restriction and ordered the lower court to reconsider the gag order's appropriateness.
Zamora v.	25 MLR 1638	1997	A criminal defendant sought to prevent a

Adams			TV movie depicting her case to be aired, but was denied.
In Re Petitions of Colorado-Oklahoma Media Reps.	25 MLR 1697	1997	Trial of Timothy McVeigh was restricted by an order prohibiting out of court comments by participants. Order was affirmed.
U.S. v. Cleveland	25 MLR 2500	1997	After a criminal trial a judge told jurors not interview with the press about their deliberations and this order was affirmed by the appellate court.
South Bend Tribune v. Elkhart C. Court	26 MLR 1694	1998	Media sought to quash a gag order imposed on the parties involved in a case, but were denied.
In Re Hattiesburg American	26 MLR 2183	1998	Appellate court reversed a decision to impose a gag order on the parties and their lawyers.
Sheehan v. King County	26 MLR 2340	1998	Plaintiff sought to have defendant restrained from publishing defamatory material on his website, but was denied.
Ex Parte State Record Co (State of S. Carolina v.	27 MLR 1193	1998	A recording between a defendant and his lawyer by the police was leaked to a news station, who were ordered not to broadcast it. Order was upheld.

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George W. Prescott Pub. v. Stoughton Div. of D. Court	27 MLR 1348	1998	Trial judge had ordered media not to publish certain information about juveniles in criminal action but order vacated on appeal.
Jeffries v. Mississippi	27 MLR 1413	1998	Reporter held in contempt for publishing details of a juvenile's record, but the conviction of reporter was reversed.
Sherrill v. Amerada Hess Corp.	27 MLR 2334	1998	Parties and lawyers were forbidden to speak to the media until trial was concluded, but the appeal court reversed the order.
State v. Blom	27 MLR 2402	1999	Defendant's lawyer sought gag order and judge denied it.
People v. Baqleh	28 MLR 2372	1999	Judge refused a request for a gag; all parties requested it and therefore can of themselves not speak to the press. Court applied Levine and Gentile but did not find a substantial likelihood.
State v. Parks	28 MLR 1318	2000	Judge refused a request for a gag order on news media in criminal case because the request was overbroad.
Dow Jones v.	28 MLR 1737	2000	A judge had banned all parties from talking

Kaye			to the news about class action case against tobacco companies, but federal court told him to remove the gag order.
Sioux Falls Argus Leader v. Miller	28 MLR 1833	2000	Media sought to have a gag order removed from all parties, but were denied.
United States v. King	28 MLR 2057	2000	Judge refused to block the airing of an interview with a witness in an upcoming trial, but did order all witnesses to refrain from interviews in the future.
Arkansas Dem.-Gazette v. Zimmerman	28 MLR 2321	2000	Gag order on news pix of juvenile reversed because court proceedings had already been held in open.
South Coast Newspapers Inc. v. Superior Court	29 MLR 1119	2000	California appellate panel holds that Superior Court judge improperly entered order prohibiting publication of legally obtained photograph of juvenile criminal defendant.
Hurvitz v. Hoefflin	29 MLR 1215	2000	California appellate court holds that trial judge erred in issuing gag order with respect to information about misconduct by a doctor.
People v. Xiong	29 MLR 1255	2000	Trial judge vacated his previous order

			gagging law enforcement and prosecution; reasons not given.
Devine v. Robinson	29 MLR 1301	2001	Federal trial judge holds that Illinois attorney disciplinary system (under direction of state supreme court) was entitled to Rule 12(b)(6) dismissal on prosecutors' claims that Rules 3.6 and 3.8 violated First Amendment rights.
Corrigan v. White	29 MLR 1636	2001	On remand from NC Court of Appeals, trial court vacated gag order against parties in connection with civil lawsuit alleging liability for sexual assaults.
Cape Pub. Inc. v. Braden	29 MLR 1653	2001	Kentucky Supreme Court affirmed intermediate appellate court decision that trial judge had erred in attempting to enforce a post-trial order banning media contact with jurors.
United States v. Brown	29 MLR 1779	2001	Fifth Circuit upheld district court's use of anonymous jury in trial of former Louisiana governor, but Fifth Circuit reversed a non-circumvention orders as unconstitutional gag order under Nebraska Press.

Anonymous v. Anonymous	29 MLR 1954	2001	NY trial judge held that there was no basis for entry of a gag order on parties in a divorce case where party seeking order was high-profile NY public official.
People v. Garcia	29 MLR 2083	2001	Trial judge denies criminal defendant's motion for temporary restraining order against NBC “Law and Order” broadcast that was similar to case involving defendant.
Dow Jones v. Kaye	29 MLR 2107	2001	Federal appeal by state judge moot because state trial concluded; but, federal district court preliminary injunction against state judge is vacated.
People v. Ackerman	29 MLR 2113	2001	Michigan appellate court affirmed a trial court's decision to deny journalists' motion to vacate an order prohibiting photographs of jurors after high-profile criminal trial. Photographers were arrested and their film confiscated.
HBE Corp v. NAACP	29 MLR 2249	2001	Defamation plaintiffs sought broad preliminary injunction banning statements by defendants, but sought-after order would restrict too much speech.

U.S. v. Scarfo	29 MLR 2254	2001	Trial judge imposed oral gag order on attorneys from talking about prospect of motion that had not been filed yet; Third Circuit said there was no issue of prejudicing jury and trial judge's only concern was having control over motion.
State v. Cohen	29 MLR 2590	2001	Denied motion for gag order because not much publicity.
Albuquerque Journal v. Jewell	29 MLR 1558	2001	NM Sup Ct dissolved juvenile court gag order on all parties in child abuse case because parents of child had changed their minds and no longer wanted gag order in place. Order excluding public and media access to courtroom, however, was affirmed.
Skakel v. Skakel	30 MLR 2374	2001	Trial court holds that there is no justification for gag order on parties in divorce case involving Michael Skakel, who faced murder charge in unrelated case.
State v. Marsh	30 MLR 1505	2002	Georgia trial judge imposes extremely broad and detailed gag order on trial participants.
State v. Marsh	30 MLR 1507	2002	Georgia trial judge slightly modifies gag

			order imposed previously to clarify it does not prohibit police from giving information to family about bodies of relatives or officials from giving public safety, health and environmental information.
United States v. Gray	30 MLR 1542	2002	Federal trial judge holds that broad gag order (seeking silencing of attorney not connected to case but yes connected to related state court case) is not warranted, but judge grants limited gag order silencing parties and lawyers to case at hand.
County Security Agency v. Ohio Dept Commerce	30 MLR 1929	2002	Sixth Circuit dissolves injunction prohibiting freelance journalist from disclosing information about private security guards in labor dispute.
State v. Neulander	30 MLR 2281	2002	NJ Supreme Court holds that media may not conduct post-trial interviews with members of hung jury in case of Jewish rabbi charged with murder his wife; primary reason is that case will be retried and allowing interviews would give advantage to prosecutors.
Los Angeles	30 MLR 2343	2002	California appellate court holds that trial

Times v. Superior Court			judge erred in ordering LA Times not to publish photographs the Times obtained lawfully in court, even though court later rescinded its permission to photograph.
State v. Evans	31 MLR 1346	2002	Florida trial judge concludes that gag order not necessary in high-profile murder case; even without gag order, lawyers and police are already forbidden from making statements that would prejudice case.
State v. Edmonds	31 MLR 1580	2002	Florida trial judge concludes that gag order not necessary in high-profile child molestation case, but judge does seal certain evidence in case.
Jackson v. Jackson	31 MLR 2404	2002	Illinois court denies motion for gag order on parties and lawyers.
Atlanta Journal-Constitution v. State	32 MLR 1424	2004	All court participants in a trial were ordered to tell the media “no comment” or “we'll talk at trial,” but it was reversed when appealed because the court failed to demonstrate a substantial need.
City of Frederick v. Randall Family	32 MLR 1609	2004	The News Post sought access to a 'black book' of someone convicting of prostitution, previous restriction on only

			publishing city officials or public figures names was struck down.
United States v. Koubriti	32 MLR 1625	2004	Defendants in a terrorism case under consideration for retrial sought to have a gag order on the case removed, but were denied.
State v. Durousseau	32 MLR 1701	2004	Defendant in a serial murder trial wished for media to be denied access to trial information, but was denied.
U.S. v. Scrushy	32 MLR 1814	2004	Federal district court granted joint motion by prosecution and defense (in criminal case of former CEO) that restricted extrajudicial statements.
People v. Bryant	32 MLR 1961	2004	Colorado Supreme Court upholds order prohibiting news media from publishing details of in camera transcripts regarding sexual history and clothing of Kobe Bryant accuser.
Associated Press v. District Court	32 MLR 2089	2004	Justice Stephen Breyer, Circuit Justice, denies application by media to stay orders of Colorado courts banning publication of contents of transcripts of in camera hearings in Kobe Bryant case.

People v. McPeters	32 MLR 2279	2004	Defendants desire for a 'gag order' on the media shows no necessity and is denied.
San Jose Mercury News v. Criminal Grand Jury	32 MLR 2322	2004	California appellate court holds that instruction to grand jury witnesses to remain quiet not First Amendment violation.
Bush v. Diocese of Peoria	32 MLR 2468	2004	Catholic Priest accused of sexually assaulting two young girls in the '60s is suing them for defamation and wished to reveal their names, but was not allowed to.
U.S. v. Gotti	33 MLR 1083	2004	Gotti sought to have a witness who happened to host a talk show gagged, but was denied.
Hobley v. Burge	33 MLR 1195	2004	Non-party deponents' motion to have media restricted from broadcasting clips of pre-trial depositions was granted.
State v. Barber	33 MLR 1564	2004	Trial judge ordered a sealed document that was leaked resealed and for no one to publish it.
Doe v. New York University	33 MLR 1755	2004	Sex assault victims not entitled to order prohibiting campus paper from publishing names because names were lawfully obtained.

U.S. v. Quattrone	33 MLR 1423	2005	A court's 'gag' order was found to be unconstitutional upon appeal.